Supreme Court, U. S.
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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Eastern District of Michigan is reported at 392 F.Supp. 1110. The Order of the United States Court of Appeals for the Sixth Circuit which is not reported appears in Appendix B to the Petition at 7a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the affirmative action of the Michigan Public Service Commission in not only approving, but indeed requiring, Respondent to adopt a schedule of rates and services which includes the mandate that Respondent provide replacement light bulbs to its rate payers constitutes "state action" under the doctrine of Parker v Brown, thus exempting Respondent's light bulb service from antitrust attack?

STATUTE INVOLVED

The statutory provision involved is Section 460.6 of the Michigan Compiled Laws (official citation), which appears in Appendix C to the Petition at 10a.

STATEMENT OF THE CASE

This case involves the practice of the Respondent electric utility, The Detroit Edison Company, of providing replacement light bulbs in exchange for burned out bulbs in accordance with the Rules, Regulations and Rates for Service affirmatively mandated by the Michigan Public Service Commission. Such schedules cover an array

of services only one of which is lamp exchange. All services must be provided unless and until the Michigan Public Service Commission orders otherwise. Adherence to such schedules and obedience to other orders of the Commission are enforceable by the Commission. As may be seen by reference to the organic statute of the Michigan Public Service Commission (Mich. Comp. Laws §460.6, set forth in Appendix C to the Petition at 10a), the Commission's scope of authority is broad. The Commission is statutorily authorized to determine what services are to be rendered to various categories of customers as well as the rates applicable thereto.

Petitioner, Lawrence Cantor, operates a retail drug store and markets, among other things, light bulbs. He brought suit alleging violation of §2 of the Sherman Act (15 USCA §2 [1970]) and §3 of the Clayton Act (15 USCA §14 [1970]) with respect to the above practice.

The case was submitted to the District Court upon Respondent's Motion for Summary Judgment. Stipulation was made that the case be limited solely to the applicability of the state action exemption doctrine of Parker v Brown, 317 U.S. 341 (1943). Therefore, it is not "uncontradicted" that Respondent "ties the sale of light bulbs to the sale of electricity."* The merits

*On the contrary, Respondent's answer filed herein denies all substantive elements of the Complaint.

of the allegations of antitrust violations were not addressed in the Motion as limited by stipulation and thus have never been reached.

Lamp exchange service was begun in 1886 by Respondent's predecessor, the Edison Illuminating Company of Detroit, and has been embodied in regulated schedules of rates and rules of service since the first rate schedule ordered into effect by a Michigan regulatory agency in 1916. The lamp exchange service rule did not, and does not, require any customer to buy light bulbs; it does require Respondent to provide the service. The Rules, Regulations and Rates for Service setting forth lamp service have been, and are, affirmatively approved and made mandatory by the Michigan Public Service Commission.

The District Court found that Respondent had furnished the Michigan Public Service Commission with the necessary information regarding lamp exchange service from which the Commission derived a comprehensive schedule of rates and services. (See, Petition, Appendix A at 3a). Finding this to be affirmative state action, and therefore within the doctrine of Parker v Brown, supra, the District Court granted summary judgment. The U. S. Court of Appeals for the Sixth Circuit affirmed, adopting the opinion of the District Court.

ARGUMENT

I. THE DECISION HEREIN DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Failing to perceive the difference between decisional conflict and factual distinction, the Petitioner attempts to show conflict among the Circuits. Consistency is acknowledged among the First, Fifth and Ninth Circuits. The Fourth and Sixth Circuits are alleged to be wayward in consequence of an imaginary "tariff sheet theory" to which Petitioner claims they subscribe. In fact, the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits* are all in decisional harmony with each other. They cross-quote each other; they are in accord

*See, e.g., George R. Whitten, Jr., Inc. v Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1969) cert. denied 400 U.S. 850 (1970); Norman's on the Waterfront, Inc. v Wheatley, 444 F.2d 1011 (3rd Cir. 1971); Business Aides, Inc. v Chesapeake & Potomac Telephone Company of Virginia, 480 F.2d 754 (4th Cir. 1973); Gaslight Company of Columbus v Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971) cert. denied 404 U.S. 1062 (1972); Bale v Glasgow Tobacco Bd. of Trade, 339 F.2d 281 (6th Cir. 1964); Ladue Local Lines, Inc. v Bi-State Dev. Agency of Mo.-Ill. Met. Dist., 433 F.2d 131 (8th Cir. 1970); State of New Mexico v American Petrofina, 501 F.2d 363 (9th Cir. 1974); Howard v State Dept. of Highways of Colorado, 478 F.2d 581 (10th Cir. 1973); Hecht v Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) cert. denied 404 U.S. 1047 (1972).

in both principle and decision. The factual settings of these cases differ, but this factor alone accounts for any diferences in results.

The Sixth Circuit's "alignment" with the Fourth Circuit might subject the former to the very criticisms asserted against the latter if the Fourth Circuit opinions in Business Aides, Inc. v Chesapeake & Potomac Telephone Company of Virginia, 480 F. 2d 754 (4th Cir. 1973), and Washington Gaslight Company v Virginia Electric Power Co., 438 F.2d 248 (4th Cir. 1970) said what the Petitioner indicates.

Business Aides, supra, does not stand for the "tariff sheet theory" characterized by Petitioner. Though Business Aides gave recognition to the significance of adherence to the rules and regulations of an operative tariff, such recognition was not without qualification. The Court clearly adopted the universally accepted proposition that reference to an operative tariff is meaningful only where such "rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority. . . ." 480 F.2d 754, 756, 757.

Washington Gaslight, supra, is similarly oversimplified by Petitioner. The Fourth Circuit gave proper recognition to the fundamentals of the Parker doctrine and concluded that because the "practices were at all times within the ambit of regulation and under the control of [the

state agency]", they were exempt from the application of the antitrust laws. However, the Court went on to find that there was no antitrust violation. Therefore, it is impossible to say that the case was decided on the basis of the Parker doctrine rather than on the merits.

Lamb Enterprises, Inc. v Toledo Blade Company, 461 F.2d 506 (6th Cir. 1972) is no aid to evaluation of the Sixth Circuit's position on Parker v Brown, supra. The state action exemption doctrine received no mention and adherence to operative tariffs was mentioned only in passing, for the case was decided on the merits.

II. THE DECISION HEREIN DOES NOT CONFLICT WITH OPINIONS OF THIS COURT

Petitioner's suggestion of a conflict between the opinion below and those in Parker v Brown, 317 U. S. 341 (1943) and Goldfarb v Virginia State Bar, 95 S.Ct. 2004 (1975) is inaccurate. Proper examination reveals no real conflict, merely distinctions based upon evidentiary differences.

The Goldfarb case was lacking one of the essential elements of a Parker doctrine exemption. Neither the Virginia legislature nor the Virginia Supreme Court had authorized or even approved the price fixing fee schedules. In fact such effect had been expressly disclaimed. Furthermore, the fee schedules involved were neither developed, approved, nor affirmatively imposed by the Virginia Court. There was no "state action" involved in the case.

The Virginia State Bar could not have brought itself within the Parker doctrine definition of state action for another important reason unnoted in the opinion. The Virginia State Bar, composed entirely of those to be regulated, could hardly be said to be an agency with the sort of independence stressed in Washington Gaslight Company v Virginia Electric Power Company, 438 F.2d 248 (4th Cir. 1971), and Asheville Tobacco Board of Trade, Inc. v FTC, 263 F.2d 502 (4th Cir. 1959). Therefore, some serious question remains of whether the Virginia State Bar was even a state agency with respect to the challenged conduct.

Petitioner asserts that the instant case aligns the Sixth Circuit with the Fourth Circuit holding in Business Aides, supra. It is then suggested that the Fourth Circuit is in conflict with the opinions of this Court. The syllogism is completed by the conclusion that the instant case therefore must conflict with opinions of this Court. The flaw in this reasoning lies in the characterization of Business Aides, supra. Neither Business Aides, supra, much maligned by Petitioner, nor the instant case (nor any other case to counsel's knowledge) has adopted a pure "tariff sheet theory" as alleged by Petitioner.

The language quoted from Business Aides was immediately followed by an explanation that the "tariff structure theory" has validity only when such "rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority. . " 480 F.2d 754, 756 (4th Cir. 1973). Such explanation precedes the reference to Business Aides in the District Court opinion herein. (See, Appendix A to the Petition at 3a).

Petitioner's reliance upon Gordon v New York Stock Exchange, Inc., 43 U.S.L.W. 4598 (U.S., June 26, 1975), is altogether misplaced as Gordon did not involve the federalism concept fundamental to the state action exemption doctrine of Parker v Brown, supra. Gordon may be added to the list of cases such as Hecht v Pro-Football, Inc., 444 F.2d 931 (D.C. Cir 1971), cert. den. 404 U.S. 1047 (1972), and Ottertail Power

Co. v United States, 410 U.S. 366 (1973) which, though discussing Parker v Brown, supra, are not governed by its principles. Merely the reference to Gordon is indicative of Petitioner's confusion between the implied repealer concept addressed in cases such as Ottertail Power, supra, and the constitutional concept of federalism underlying Parker v Brown, supra.

Gratuitous discourse on the parameters of the Parker state action exemption doctrine abound. Many Courts have undertaken analysis of the Parker doctrine in circumstances totally devoid of considerations of federalism fundamental to Parker. Because such cases do not involve state action which conflicts with the federal antitrust laws, their analyses of Parker are at best dicta. Not surprisingly, the genuine Parker doctrine cases do not refer to these non-Parker analyses.

III. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner intimates that the Parker doctrine, left unclarified, will result in wholesale circumvention of the federal antitrust laws. His real objection stems from language in the District Court's opinion herein:

> "Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." (Appendix A to the Petition at 4a, 5a).

Yet, such objection is clearly addressed to the wisdom, rather than the fact, of state action.

By the very essence of Parker the criterion must be affirmative state action. It is not for the federal courts to engage in second-guessing in evaluation of specific state action. The wisdom of a state's action is beyond inquiry. Were it otherwise, the constitutional principle of federalism fundamental to our government would be in grave jeopardy.

Petitioner does not suggest the underlying constitutional concept of federalism fundamental to Parker v Brown be altered. He merely quibbles with its application in the instant case. Furthermore, in so doing he centers on a "tariff sheet theory" which, though troublesome to him, does not in fact

exist and is therefore no real threat to the administration of the federal antitrust laws.

Petitioner hints at procedural importance in his second question presented. It need only be said that the law of summary judgment is well established and not in controversy. The standards for summary judgment were not, nor should they have been applied any differently in this case than in any other. Both courts below, following such settled law of summary judgment, found no genuine issue of material fact and entitlement to judgment as a matter of law. Accordingly, judgment for Respondent was properly entered and affirmed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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